In my judgment, in the light of the authorities which I have cited above, the learned judge's findings are not open to question. I would dismiss this appeal with costs.

Ali F.J. concurred.

Appeal dismissed.

Solicitors: *Athi Nahappan & Co.*; *Yeo & Yeo.*

M.A. CLYDE v. WONG AH MEI & ANOR.

[F.C. (Suffian Ag. L.P., Gill and Ali F.JJ.) July 22, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 116 of 1969]

Negligence — Res ipsa loquitur — Bicycle knocked from behind by a motor car — Onus on driver of motor car to explain — Contributory negligence — Defendant not giving evidence.

Evidence — First information report — Whether admissible in civil proceedings — Evidence Ordinance, 1950, ss. 17, 18 and 21.

In this case the respondent had claimed damages in respect of the death of one Soon Ah as a result of his being knocked down by a car driven by the appellant. The learned trial judge found in favour of the respondent, as he held that the bicycle on which the deceased was riding was knocked down from behind by the appellant's car. He held that the onus to explain why the collision took place was with the appellant and as the appellant had chosen not to give evidence, he gave judgment against her. A report made by the appellant to the police about the accident was admitted in evidence and on appeal it was argued *inter alia* that the evidence had been wrongly admitted.

Held, dismissing the appeal: (1) negligence is a question of fact and each case must depend on its own facts. There is no rule of law which in every case disqualifies a motorist from recovering damages where he has run into a stationary unlighted object on the ground that he was thereby shown to be negligent. In this case however the appellant had chosen to give no evidence and the learned trial judge was justified in holding that there was a case for the appellant to answer and as she had failed to do so, that she was liable;

(2) the learned trial judge was justified in holding that the doctrine of *res ipsa loquitur* applied and that therefore the onus lay on the appellant to explain why she knocked the deceased from behind and, as the appellant chose not to give any explanation, judgment was rightly given against her;

(3) the report of the appellant in this case was a first information report and was admissible under sections 17, 18 and 21 of the Evidence Ordinance, 1950.

Cases referred to:-

(1) *Rengasamy Chettiar* v. *Periasamy* [1937] M.L.J. xxv.

(2) *Martin Rhienus* v. *Sher Singh* [1949] M.L.J. 201.

(3) *State of Gujarat* v. *Hiralal Devji* A.I.R. 1964 Gujarat 261.

(4) *Bishen Das* v. *Ram Labhaya* A.I.R. 1916 Lahore 133.

(5) *Page* v. *Richards & Draper* (1920) 36 English & Empire Digest 92, para. 502 cited in 149 L.T. p. 263, D.C.

(6) *Yow Fook* v. *Weong Kim Tew* [1961] M.L.J. 38.

(7) *Butterfield* v. *Forrester* (1809) 11 East 60; 103 E.R. 926.

(8) *Davies* v. *Mann* (1842) 10 M. & W. 546; 152 E.R. 588.

(9) *Radley* v. *London & North Western Rly. Co.* (1876) 1 App. Cas. 754, 759.

(10) *British Columbia Electric Railway Co. Ltd.* v. *Loach* [1916] 1 A.C. 719.

(11) *Boy Andrew (Owners)* v. *St. Rognvald (Owners)* [1948] A.C. 140.

(12) *Tart* v. *G.W. Chitty & Co. Ltd.* [1933] 2 K.B. 453; (1933) 149 L.T. 261; [1931] All E.R. Rep. 826.

(13) *Baker* v. *E. Longhurst & Sons Ltd.* [1933] 2 K.B. 461.

(14) *Tidy* v. *Battman* [1934] 1 K.B. 319.

(15) *Stewart* v. *Hancock* [1940] 2 All E.R. 427.

(16) *Morris* v. *Luton Corporation* [1946] 1 K.B. 114.

(17) *Hill-Venning* v. *Beszant* [1950] 2 All E.R. 1151.

(18) *Colvilles Ltd.* v. *Devine* [1969] 1 W.L.R. 475, 477; [1969] 2 All E.R. 53, 56.

(19) *Scott* v. *London & St. Katherine Docks & Co.* (1865) 3 H. & C. 596, 601; 159 E.R. 665, 667.

(20) *Roe* v. *Minister of Health* [1954] 2 Q.B. 66, 88.

(21) *Woods* v. *Duncan* [1946] A.C. 401, 439.

(22) *Barkway* v. *South Wales Transport Co. Ltd.* [1948] 2 All E.R. 460; [1950] 1 All E.R. 392.

(23) *Laurie* v. *Raglan Building Co.* [1941] 3 All E.R. 332.

(24) *Moore* v. *R. Fox and Sons* [1956] 1 All E.R. 182.

(25) *Walsh* v. *Holst & Co. Ltd.* [1958] 3 All E.R. 33.

(26) *Swan* v. *Salisbury Construction Co.* [1966] 1 W.L.R. 204.

(27) *Ludgate* v. *Lovett* [1969] 1 W.L.R. 1016; [1969] 2 All E.R. 1275.

(28) *Pearce* v. *Round Oak Steel Works Ltd.* [1969] 3 All E.R. 680; [1969] 1 W.L.R. 595.

(29) *Henderson* v. *Henry E. Jenkins & Sons* [1969] 3 All E.R. 756.

(30) *Mummery* v. *Irvings Proprietory* (1956) 96 C.L.R. 99.

(31) *Nominal Defendant* v. *Haslbauer* (1967) 117 C.L.R. 448.

FEDERAL COURT.

S. D. K. Peddie for the appellant.

Tara Singh Sidhu for the respondents.

Cur. Adv. Vult.

Gill F.J.: This appeal arises out of an action by the respondents as plaintiffs against the appellant as defendant, in which they claimed and were awarded damages under sections 7 and 8 of the Civil Law Ordinance, 1956 in respect of the death of one Soon Ah alias Chan Kui Soon as a result of his being knocked down by a car driven by the defendant. The quantum of damages having been agreed upon between the parties, the question as regards liability was decided by the trial court against the defendant. From that decision the defendant has now appealed to this court.

The accident occurred at the 10th mile, Federal Highway at about 10.10 p.m. on 22nd August, 1963 when the deceased was riding a bicycle in the direction of Kuala Lumpur and the defendant was driving her motor-car SS 3784 in the same direction. Prior to his death the deceased lived with his wife and children at house No. E573 Sungei Way New Village which is situated on the right hand side of the Federal Highway as one goes from Kuala Lumpur to Klang. On the same side of the Highway about 1½ miles further up from the new village on its Klang side is a row of ten shop houses, one of which belonged to the deceased's wife whose tenant then was one Suppiah. On the date

of the accident the deceased left his house on a bicycle at about 9 p.m. At about 9.30 p.m. he arrived at his wife's shop house where he met Suppiah. Apparently he had gone there to collect rent, and, having spoken to Suppiah, he left on his bicycle almost immediately. Presumably he was on his way home when he was knocked down and killed.

At 10.50 p.m. on the same night the defendant made a report at Sungei Way police station, which was recorded by police constable Maarof bin Samad (P.W. 2) who then proceeded to the scene of the accident, where he found motor-car SS 3784 on the left side of the road facing Kuala Lumpur and a bicycle 50 feet 8 inches behind the motor-car as shown in the sketch plan of the scene which he drew and which was put in evidence. On examining the motor-car for damage, he found the glass of the right front head lamp broken, a slight cut on front right bumper and a slight bent on hood above the driver's seat. As regards damage to the bicycle, the rear wheel was bent and the rear lamp smashed, and he found the rear mudguard of the bicycle to be rusty and without any sign of white paint on it.

Maarof was unable to indicate the exact site of the accident as there were no marks on the road to indicate how the collision took place. There was nothing to suggest that the collision took place on the grass verge, his evidence being that if the collision had taken place there he would expect to find some marks, although he said in re-examination that the grass table was so hard that he would not expect marks to be left if the left tyres of the car had gone over it. The motor-car did not appear to have been removed from the position where it had stopped, but quite naturally he could not rule out the possibility that the bicycle had been moved from the place where it had fallen immediately after the accident.

The Federal Highway has a dual carriageway with a road divider in between. Stretching over some distance in front of and behind the scene of the accident the carriageway on the right hand side of the divider as one faces Kuala Lumpur was then closed to traffic because of road repairs, with the result that over that stretch of the road all traffic from Kuala Lumpur to Klang was obliged to use the carriageway on its right hand side of the divider, which alone was open to traffic from both sides. There was an opening in the divider about three to four chains further up from the scene towards Klang, through which the same traffic re-entered its correct side of the dual carriageway. There must, of course, have been another opening in the divider further down the road towards Kuala Lumpur, through which traffic going in the direction of Klang entered that stretch of the dual carriageway which had to be used by traffic from both sides. It would seem clear, therefore, that the deceased did not have to go through either of these openings if he was returning from the shop houses to his house, both of which were on the same and his proper side of the divider.

In her report to the police the defendant stated as follows:

> "At about 10.10 p.m. on 22.8.63 I was driving my motor-car bearing No. SS 3784 at 30 miles per hour. At that time I was passing the 10th mile at Sungai Way. There were then many vehicles from the front but I did not see any person in front. Suddenly I heard a bang of my motor-car being knocked. I applied my brakes and stopped my motor-car. I alighted and saw a male person who had fallen on to the road with a bicycle. The male person was injured and the rear wheel of his bicycle was twisted. That injured person was taken to the Assunta Hospital by someone. I did not receive any injuries. When the accident happened there were only both of us in my motor-car — a female staff nurse and myself. The front off-side lamp and the cup of my motor-car were damaged. Apart from these there was no other damage to my motor-car."

The report was admitted in evidence on behalf of the plaintiffs, notwithstanding a submission by counsel for the defendant that it was inadmissible on the ground of hearsay.

Neither the defendant nor the female staff nurse who was stated by the defendant in her police report to have been with her in the car at the time of the accident gave evidence for the defence, so that the case rested entirely on the evidence which was produced on behalf of the plaintiffs.

It is contended for the appellant that the police report was in fact a statement in the course of police investigation, because the evidence of Maarof was that he arrived at the scene at 10.30 p.m., whereas the police report was taken down at 10.50 p.m. before which time he had carried out some investigations. And it is argued on that basis, on the authority of *Rengasamy Chettiar* v. *Periasamy*[1] and *Martin Rhienus* v. *Sher Singh*,[2] that the statement was absolutely privileged and therefore should not have been admitted in evidence.

I do not agree that the police report was in the nature of a statement in the course of investigation. Although Maarof said that he arrived at the scene at 10.30 p.m., he stated quite definitely that he went there after recording the report. No point was made in the court below of this apparent conflict in his evidence, and he was certainly not asked to explain how he could have possibly arrived at the scene at 10.30 p.m. after recording the report if that was made at 10.50 p.m. If the accident took place at 10.10 p.m., as the defendant stated in her report, she could not have arrived at the police station much earlier than 10.30 p.m. Assuming that the police constable heard her story, and proceeded to the scene without reducing it into writing, he could not have arrived there earlier than 10.50 p.m., and even if he did not spend too much time at the scene he could not have got back to the police station much before 11.30 p.m. He did not say that he took the defendant to the scene and then brought her back for her report to be recorded, and if she was not there when he wrote out the report, did he write it out from memory? I do not think so. It would seem clear therefore that he was mistaken when he said that he arrived at the scene at 10.30 p.m. This was perfectly natural as he was giving evidence some six years after the event. I am therefore satisfied that the report was made before any investigation took place. In the circumstances, the police report was clearly a first information report and not a statement in the course of

police investigation, so that the two cases relied upon for its rejection are wholly inapplicable.

On the assumption that the police report was a first information report, it was contended by counsel for the appellants, on the authority of *State of Gujarat* v. *Hiralal Devji*,[3] that it was not substantive evidence and could only be used to corroborate or contradict the maker of that report. The short answer to that is that the provisions of the Criminal Procedure Code do not apply to a civil action. In my judgment if a first information report contains an admission which is relevant to a claim in a civil action against him, it is admissible in evidence under sections 17, 18 and 21 of the Evidence Ordinance, 1950. I find support for this from the decision in *Bishen Das* v. *Ram Labhaya*,[4] with which I respectfully agree, and which went so far as to say that though an admission of guilt made by a defendant to a police officer is not receivable in evidence as a "confession" as against him if he is on his trial as an accused person, yet it is acceptable in a civil suit as an admission under sections 17, 18 and 21 of the Evidence Act. The admission, of course, cannot be regarded as conclusive, and it is open to the person who made it to explain it away, which was not done in this case.

The findings of fact which the learned trial judge made on such evidence as was produced by the plaintiffs, the defendant having elected to call no evidence, are stated in his grounds of judgment as follows: —

"From the relevant materials adduced in evidence including damage to the motorcar and the bicycle, there was no doubt that the deceased was knocked down by the car from behind. There was no possibility that the deceased was crossing the road when he was knocked down otherwise the defendant could have seen him before the impact, which was not the case, and the damage to his bicycle would have been different. Similarly, if the deceased was cycling in the middle of the road, the defendant could have seen him before the impact. On the other hand, the damage to the offside front portion of the car was indicative of the defendant swerving her car to the extreme left edge of the road on seeing the lights of an oncoming car and thus knocking into the rear of the deceased's bicycle without knowing the deceased was there."

The conclusion at which he arrived on these findings of fact was that it was for the defendant to explain why she knocked the deceased from behind. In reaching that conclusion he relied on certain passages from the judgments in *Page* v. *Richards & Draper*[5] and *Yow Fook* v. *Woon Kim Tew*,[6] and, in the absence of any explanation from the defendant, gave judgment in favour of the plaintiffs.

It is contended for the appellant that the learned judge erred in law in holding that the onus was on her to explain why she collided with the deceased and that he failed to observe that neither the case of *Page* v. *Richards & Draper*[5] nor the case of *Yow Fook* v. *Woon Kim Tew*[6] had any application in the circumstances of the present case. It is to be observed that the decision in the former case turned on the question of contributory negligence at common law, and in the latter on the doctrine of *res ipsa loquitur*.

To take first the case of *Page* v. *Richards & Draper*,[5] the principle on which that case was decided was laid down in the old case of *Butterfield* v. *Forrester*[7] in which the defendant wrongfully obstructed a street in Derby by placing a pole across it. The plaintiff rode along the street "at eight o'clock in the evening of August, when they were just beginning to light candles", but while there was still sufficient light to notice the obstruction. Coming into collision with the pole, he was thrown from his horse and injured. It was held that he had no cause of action, as he could, notwithstanding the defendant's negligence, have avoided the accident by the use of due care. Lord Ellenborough C.J. said:

"A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorise another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

Butterfield v. *Forrester*[7] was cited with approval in the case of *Davies* v. *Mann*[8] in which the plaintiff negligently left his donkey, fettered in the forefeet, in the highway. The defendant, driving his wagon and horses "at a smartish pace", crashed into the animal and killed it. It was held that the defendant was liable, notwithstanding the fact that the accident would not have happened but for the negligence of the plaintiff, on the ground that the defendant had a sufficient opportunity of avoiding by the use of reasonable care the danger so created by the plaintiff's negligence. Parke B. said:

"....although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

Davies v. *Mann*,[8] which is usually regarded as supporting the rule of last opportunity, was approved by the House of Lords in *Radley* v. *London & North Western Railway Co.*[9] in which Lord Penzance said:

"....though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

The case of *British Columbia Electric Railway Co., Ltd.* v. *Loach*[10] is said to have laid down the doctrine of "constructive last opportunity", which meant that if the defendant would have had the last opportunity but for his own negligence, he was in the same position as if he had actually had it, and the plaintiff again recovered in full. In *Boy Andrew (Owners)* v. *St. Rognvald (Owners)*,[11] however, Viscount Simon said at pages 148-149:

"The principle of *Davies* v. *Mann*[8] has often been explained as amounting to a rule that when both parties are careless, the party which has the last opportunity of avoiding the results of the other's carelessness is alone liable. The suggested test of 'last opportunity' seems to me inaptly phrased and likely in some cases to lead to error, as the Law Revision Committee said in their report (Cmd. 6032 of 1939, 16): 'In truth, there is no such rule — the question, as in all questions

of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong?' "

Going back to the case of *Page* v. *Richards & Draper*,[5] the plaintiff there was walking home with one or two friends at about ten o'clock on a night in July when a car driven by the defendant came up from behind and drove into him causing him serious hurt. Rowlatt J. said:

"It seems to me that when a man drives a motor car along the road he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound to go no faster than will permit of his stopping, or deflecting his course, at any time to avoid anything he sees, after he has seen it. If there is any difficulty in the way of his seeing, like a fog for instance, he must go slower in consequence. In a case like this, where a man is struck without the driver seeing him, the driver, the defendant, is in this dilemma: either he was not keeping a sufficient lookout, or, if he was keeping the best lookout possible, then he was going too fast for the lookout that could be kept. I really do not see how it can be said that there was no negligence in running into the back of a man. If he had had better lights or had kept a better lookout, the probability is that the accident would never have happened."

Butterfield v. *Forrester*[7] and *Page* v. *Richards & Draper*[5] were followed in *Tart* v. *G. W. Chitty and Co., Limited*[12] in which the facts were as follows. On a dark evening, when it was raining and blowing hard, a Foden steam wagon pulled up nine inches from the kerb in a 14-foot street, so that the driver's mate might attend to the rear lamp which had gone out. The place where the wagon pulled up was very dark. A motor cyclist whose light threw a beam of 15 yards crashed into the back of the wagon and he was injured. It was held that judgment must be entered for the defendant because the evidence was consistent only with contributory negligence on the part of the plaintiff, who must either have not been keeping a proper look-out or have been travelling at such a fast speed that he was unable to stop his motorcycle or to swerve so as to avoid the collision.

In *Baker* v. *E. Longhurst and Sons, Ltd.*[13] a horse and cart belonging to the defendants was going along a dark road at night on its proper side but without a light. There ran into it from behind a motorcycle ridden by the plaintiff, who was thereby injured and the motorcycle damaged. It was a straight road and the beam of the head-lamp of the motorcycle showed 30 yards. The brakes of the motorcycle were good and the plaintiff could easily pull up in 10 yards, but he had not applied his brakes. It was held that the plaintiff was guilty of negligence and therefore not entitled to recover. Scrutton L.J. said (at page 468):

"If a person rides in the dark he must ride at such a pace that he can pull up within the limits of his vision, and if, in those circumstances, he strikes something, either he is going too fast or he has not been keeping a proper look-out."

In *Tidy* v. *Battman*[14] the defendant's motor lorry was drawn across the road running from Chichester to Arundel at 7.45 p.m. on February 23, 1932 in such a position as to be an unlighted obstruction. A motor-car had stopped behind the lorry about ten yards away on the near side, when the plaintiffs' son, who had been following the car on his motorcycle, drew out from behind, dashed into the lorry, and was killed. The plaintiffs brought an action in the county court under Lord Campbell's Act for compensation for loss as a result of the negligence of the defendant or his servant. The defence was that the accident was caused by the contributory negligence of the deceased. The county court judge left the case to the jury, who found that the defendant was negligent, and that the deceased could not by the exercise of ordinary care have avoided the consequences of that negligence. Judgment was entered accordingly and it was upheld by the Divisional Court where Macnaghten J. said (at pages 320 and 321):

"At night time the visibility of an unlighted obstruction to a person driving a lighted vehicle along the road must necessarily depend on a variety of facts, such as the colour of the obstruction, the background against which it stands, and the light coming from other sources .... It cannot, I think, be said that where there is an unlighted obstruction in the roadway, a careful driver of a motor vehicle is bound to see it in time to avoid it, and must therefore be guilty of negligence if he runs into it."

The Court of Appeal, affirming the Divisional Court, held that, on the above facts, the questions of negligence and contributory negligence were rightly left to the jury. Lord Wright said (at page 322):

"The cases of *Tart* v. *G.W. Chitty & Co.*[12] and *Baker* v. *E. Longhurst & Sons, Ltd.*[13] show that no one case is exactly like another, and no principle of law can in my opinion be extracted from those cases. It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts."

In the New Zealand case of *Stewart* v. *Hancock*,[15] which went up to the Privy Council, the facts were as follows. The appellant was riding his motorcycle on his proper side along a main highway in the direction of Auckland just after midnight. An unlighted stationary motor-car owned by the respondent was standing at the side of the road facing in the same direction. On the opposite side and some 30 yards beyond was another stationary car facing in the opposite direction and showing lights. This car had stopped in response to a signal from the respondent. The appellant reduced his speed from about 35 m.p.h. to about 25 m.p.h. when approaching this latter car, and after passing out of the beams of its headlight, saw the respondent's car, braked and swerved, but came into collision with the nearside rear mudgard and sustained injuries in respect of which he brought action against the respondent. At the trial of the action Fair J. directed the jury that, if they found that the plaintiff had the last opportunity of avoiding the accident and negligently failed to avail himself of it, or that he was negligent in any of the respects alleged and such negligence was a proximate cause of the accident, there should be a verdict for the defendant. He also told the jury that, if they found that negligence of the defendant was the sole proximate cause of the accident, there should be a verdict for the plaintiff. The jury returned a verdict for the appellant for damages amounting to £1,259 8s 2d and judgment was entered in accordance with the verdict. An appeal by the respondent to the Court of Appeal of New Zealand was allowed, Ostler and Johnston JJ. (Smith J. dissenting) holding that judgment should have been entered for

the respondent, on the ground that it was conclusively proved that the proximate cause of the accident was the appellant's own negligence and that the verdict of of the jury was so unreasonable as to be perverse. On further appeal, the Privy Council restored the judgment in favour of the appellant by the trial court. Their Lordships of the Privy Council held that there was proper and ample evidence before the jury that the appellant, whilst dealing with a situation of some difficulty, created by the respondent himself, and whilst keeping a proper lookout, properly attended for a sufficient time to an element of possible danger — namely, the other car — to account for the fact that he did not see the respondent's unlighted car in time to avert the consequences of its naturally unexpected presense. In so holding, they approved the *dictum* of Macnaghten J. in *Tidy* v. *Battman*[14] that it cannot be said that, where there is an unlighted obstruction in the roadway, a careful driver is bound to see it in time to avoid it and must, therefore, be guilty of negligence if he runs into it.

In *Morris* v. *Luton Corporation*[16] it was held, disapproving the *dictum* of Scrutton L.J. to the contrary in *Baker* v. *Longhurst & Sons, Ltd.*[13] and approving the *dictum* of Lord Wright in *Tidy* v. *Battman*[14] that there is no rule of law that a person riding or driving in the dark must be held to be negligent if he is driving at such a speed that he is not able to pull up within the limits of his vision. Lord Greene M.R. said (at page 115):

"There is sometimes a temptation for judges in dealing with these traffic cases to decide questions of fact in language which appears to lay down some rule which users of the road must observe. That is a habit into which one perhaps sometimes slips unconsciously — I may have done it myself for all I know — but it is much to be deprecated, because these are questions of fact dependent on the circumstances of each case."

As Slesser L.J. said in *Tidy* v. *Battman*,[14] the principles laid down in the older authorities, such as *Butterfield* v. *Forrester*,[7] were not affected by the observations of the Court of Appeal. He went on to say that each of those earlier cases depended on its own facts, and that one must apply to those facts the principles laid down in the authorities dealing with the matter. Speaking of the case before him, he said that there was ample evidence upon which the jury could find, first, that the defendant had been negligent; and, secondly, that the deceased man could not by the exercise of ordinary care have avoided the consequences of that negligence.

The principle which emerges from the cases which I have considered, therefore, is that negligence is a question of fact and not of law, that each case must depend on its own facts, and that there is no rule of law which in every case disqualifies a motorist from recovering damages where he has run into a stationary unlighted object. It is to be observed that in the reported cases in which the driver of a motor vehicle escaped from the dilemma mentioned in *Page* v. *Richards & Draper*[5] and was therefore successful in the action, he gave evidence to show that he could not avoid the accident by the exercise of ordinary care. In the present case, however, the defendant chose to give no evidence. In the circumstances, the learned trial judge cannot be said to have completely misdirected himself by relying on the *dictum* of Rowlatt J. in *Page* v. *Richards & Draper*.[5] After all, what he said on the authority of that *dictum* was that there was a case for the defendant to answer.

I think it is also pertinent to point out that paragraph 28 of the Highway Code, which has received legislative approval as required under section 59(2) of the Road Traffic Ordinance, 1958, provides:

"At night the distance that you can see an unexpected obstacle on an unlighted road is very limited. Anyone who drives at such a speed that he cannot stop within the range of his vision is driving dangerously."

And section 59(4) of the said Ordinance says:

"Failure on the part of any person to observe any provisions of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings, whether civil or criminal, be relied on by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings."

The defence pleaded in this case was that the accident was caused solely by the negligence of the deceased, although, as I have already stated, no evidence was produced by the defendant to establish any such negligence. Contributory negligence as such was not pleaded, although one of the grounds of appeal is that the facts indicated negligence on the part of the deceased. It is to be observed that the rule at common law in relation to contributory negligence having been modified by section 12(1) of our Civil Law Ordinance, 1956, which is in *pari materia* with section 1(1) of the English Law Reform (Contributory Negligence) Act, 1945, the damages recoverable would have had to be reduced to the extent of the deceased's responsibility for the damage, if he himself had been proved to be negligent.

As regards apportionment of blame where both parties have been negligent, *Hill-Venning* v. *Beszant*[17] is a case in point under the present law. The defendant in that case, a motor-cyclist, stopped at night on a highway because the lighting system of his motor-cycle had failed. He alighted, leaving the motor-cycle, which was about three feet in breadth at its broadest point, on the highway. There was a grass verge, level with the surface of the highway, to which the defendant could have wheeled his motor-cycle without difficulty. He did not do so, however, as he assumed that all that was needed was to change the bulb in the headlight. He then discovered that the fault was in the electric wiring, and when he was about to do the necessary repairs he noticed the light of an approaching vehicle, which was the plaintiff's motor-cycle. The plaintiff, who had his headlight dipped, failed to observe the defendant's motor-cycle in time to avoid it, and he came into collision with it. It was not disputed that the plaintiff had been negligent. On the question whether the defendant had also been negligent in not removing his motor-cycle from the highway on to the grass verge, it was held by the Court of Appeal (Somervell L.J. dissenting) that the defendant, by failing to remove his motor-cycle off the highway, had not taken all reasonable precautions to prevent danger to other traffic. He was, therefore, negligent, and the blame for the acci-

dent must be apportioned as to two-thirds to the plaintiff and one-third to the defendant. In the present case, however, there was not a scrap of evidence that the deceased had been negligent in any way.

The next question which I have to consider is whether *res ipsa loquitur* applies to the circumstances of the present case.

As Lord Guest said in *Colvilles, Ltd.* v. *Devine,*[18] the doctrine of *res ipsa loquitur* emanates from the following well-known passage of Erle C.J. in *Scott* v. *London and St. Katherine Docks Co.*[19]:

"There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

Thus, the principal requirement for the *maxim* to apply is that the mere fact of the accident having happened should tell its own story and raise the inference of negligence so as to establish a *prima facie* case against the defendant. The story must be clear and unambiguous; if it may tell one of half a dozen stories the *maxim* is inapplicable. In other words, where it applies, the *maxim* entitles the plaintiff to rely as evidence of negligence upon the mere happening of the accident. He need not allege or prove any specific act or omission of the defendant if the result, which he does prove, of some unspecified act or omission makes it more probable than not that the damage was caused by the negligence of the defendant.

The fundamental basis of the *maxim* is that the rule that it is for the plaintiff to prove negligence and not for the defendant to disprove it, may cause hardship to the plaintiff if it is impossible for him to know what precise acts of omission led to his damage, and this is most obviously so where the cause of the damage is peculiarly within the means of knowledge of the defendant who caused it. This hardship can sometimes be avoided by the application of the *maxim res ipsa loquitur*. As Morris L.J. said in *Roe* v. *Minister of Health,*[20] "there are certain happenings that do not normally occur in the absence of negligence, and upon proof of these a court will probably hold that there is a case to answer." The *maxim*, however, is not a principle of substantive law but a rule of evidence. In this connection, Lord Simonds in *Woods* v. *Duncan*[21] said:

"But to apply this principle is to do no more than shift the burden of proof. A *prima facie* case is assumed to be made out which throws upon him the task of proving that he was not negligent. This does not mean that he must prove how and why the accident happened: it is sufficient if he satisfies the court that he personally was not negligent. It may well be that the court will be more easily satisfied of this fact if a plausible explanation which attributes the accident to some other cause is put forward on his behalf; but this is only a factor in the consideration of the probabilities. The accident may remain inexplicable, or at least no satisfactory explanation other than his negligence may be offered: yet, if the court is satisfied by his evidence that he was not negligent, the plaintiffs' case must fail."

If the facts are sufficiently known, the question ceases to be whether the facts speak for themselves, and the only question is whether on the facts as established, negligence is to be inferred or not. The exclusion of the *maxim* does not, of course, necessarily lead to the conclusion that the defendant was not negligent. This is illustrated by the case of *Barkway* v. *South Wales Transport Co., Ltd.*[22] in which the facts were as follows. The appellant's husband was killed while travelling as a passenger in the respondents' omnibus, which at the time of the accident was being driven at a speed of some twenty-five miles per hour in a "black-out". The immediate cause of the accident was the bursting of its offside front tyre, as a result of which it veered across the road over to the offside, mounted the pavement, crashed into some railings, and fell down an embankment. A great deal of evidence was given by the defendants and it was established that the cause of the accident was a defect in one of the tyres which might have been discovered beforehand if the respondents had required their drivers to report occurrences which could result in "impact fractures" due to one or more heavy blows on the outside of the tyre leading to the disintegration of the inner parts. Such a fracture might occur without leaving any visible external marks, but a competent driver would be able to recognise the difference between a blow heavy enough to endanger the strength of the tyre and a lesser concussion. Sellers J. (the trial judge) found that the respondents were guilty of negligence in their tyre maintenance and awarded the appellant £2,000 damages. That finding was reversed by the Court of Appeal where it was held by a majority (Scott and Asquith L.JJ., Bucknill L.J. dissenting) that the respondents by their evidence had displaced the presumption of negligence raised by the fact that the omnibus had fallen over the embankment and that they had exercised adequate and reasonable care in maintaining and inspecting the tyre and were not responsible for the defect which caused the accident. Asquith L.J. said (at page 471):

"The position as to onus of proof in this case seems to me to be fairly summarised in the following short propositions. (i) If the defendants' omnibus leaves the road and falls down an embankment, and this without more is proved, then *res ipsa loquitur*, there is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption. (ii) It is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre-burst, since a tyre-burst *per se* is a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of the decision in *Laurie* v. *Raglan Building Co., Ltd.*[23], where not a tyre-burst but a skid was involved. (iii) To displace the presumption, the defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable, or (b), if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres: *Woods* v. *Duncan, The Thetis.*[21] The second limb, (b), of the last proposition is the relevant one for the purposes of this case."

The case went up to the House of Lords, where it was held that as the cause of the accident was known *res ipsa loquitur* did not apply, but that on the facts the negligence of the defendants was established. Lord Porter said (at p. 394):

"The doctrine is dependent on the absence of explanation. and, although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not."

Lord Normand said (at page 399):

"The fact that an omnibus leaves the roadway and so causes injury to a passenger or to someone on the pavement is evidence relevant to infer that the injury was caused by the negligence of the owner, so that, if nothing more were proved, it would be sufficient foundation for a finding of liability against him. It can rarely happen when a road accident occurs that there is no other evidence, and, if the cause of the accident is proved, the *maxim res ipsa loquitur* is of little moment. The question then comes to be whether the owner has performed the duty of care incumbent on him, or whether he is by reason of his negligence responsible for the injury. The *maxim* is no more than a rule of evidence affecting onus. It is based on commonsense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant."

In *Moore* v. *R. Fox & Sons*[24] the plaintiff's husband was employed by the defendants as a phosphater and in the course of his work it was his duty to immerse metal objects in a de-rusting tank which was filled with liquid chemicals maintained at a temperature of 140°F by a thermostatically-controlled gas burner situated under the tank. While he was attending to the tank, an explosion occurred under the tank and he was fatally injured. The plaintiff claimed damages against the defendants on the ground that her husband's death was attributable to their negligence. Streatfeild J. held that the doctrine *res ipsa loquitur* applied to the facts of the case, but that the defendants had successfully discharged the onus which was thus on them to disprove negligence, because, although they were unable to give positive evidence how the accident actually occurred, they were able to give an explanation satisfactory to the court which indicated that the accident was just as likely to have occurred without their negligence as with it. On appeal it was held by the Court of Appeal, adopting the principle stated by Asquith L.J. in *Barkway* v. *South Wales Transport Co., Ltd.*,[22] that the plaintiff was entitled to recover damages because —

(a) (i) the *maxim* of *res ipsa loquitur* applied as the plant was under the management of the defendants or their servants and the accident was such as in the ordinary course of things would not have happened if proper care had been taken, and

(ii) the defendants had failed so to explain the accident as to discharge the onus which was on them to show either that the explosion was due to a specific cause not connoting their negligence or that they used all reasonable care in and about the management of the plant, it being insufficient for the defendants merely to show that the accident could have happened without negligence on their part, and

(b) the plaintiff, on the alternative footing that the *maxim res ipsa loquitur* did not apply, had established negligence on the part of the defendants.

Res ipsa loquitur was held to apply in *Walsh* v. *Holst & Co., Ltd.*[25] in which the plaintiff was injured by a brick falling from a large four-storey building adjoining the highway, where contractors employed by the occupiers of the building were carrying out a conversion of the building which involved enlarging window openings and dislodging bricks, but the action failed because the defendants had satisfied the court that they had not been negligent. Similarly, in *Swan* v. *Salisbury Construction Co.*[26] where the appellant, an employee of the respondent company, suffered injuries owing to the collapse of a crane which the respondents were using to drive piles for the foundation of a building, the Privy Council held that, while the *maxim res ipsa loquitur* applied, the respondents had discharged the burden on them by showing that they had not been negligent. In dismissing the appeal the Privy Council applied the *dicta* of Lord Porter and Lord Normand in *Barkway* v. *South Wales Transport Company, Ltd.*[22]

In *Colvilles, Ltd.* v. *Devine*[18] the respondent was injured when a violent explosion occurred in the steelworks of the appellants where he was employed. The explosion followed a fire in a flexible hose carrying oxygen into a container in which there were 100 tons of molten metal. There ensued a general panic among the workmen during which the respondent jumped from a platform 15 feet above the ground and was injured. He brought an action against the appellants for damages for negligence. In the course of the hearing it was suggested that the fire resulted from particles in the oxygen stream in the hose being ignited by friction, but the appellants led no evidence to show that there had been any inspection of the filters for the oxygen to see whether they were working properly. The trial judge, whose decision was upheld by the Second Division of the Court of Session, held that the *maxim res ipsa loquitur* applied and gave judgment for the respondent. On appeal to the House of Lords, it was held that an explosion of such violence as to cause fear of imminent danger to workers did not occur in a steel-works in the ordinary course of things if the management used proper care and, accordingly, in the absence of an explanation by the appellants the doctrine of *res ipsa loquitur* applied. It was held further that, though the appellants were not obliged to produce positive evidence of the presence of the particles in the hose, their explanation how the accident might have happened did not amount to an exculpation in that they did not prove that the filters to keep out such particles were reasonably effective or had been inspected.

In Lord Guest's words, the employers, the appellants in this case, "are absolved if they can give a reasonable explanation of the accident and show this explanation was consistent with no lack of care on their part". This involved two things. First, a "plausible explanation" of the occurrence, in the language of Lord Simonds in *Woods* v. *Duncan*.[21] Such an explanation was to be found in what witnesses said as to the likelihood of the ignition of particles in the oxygen stream as a result of friction. The other aspect of the burden on the defendant employers was an explanation that had to be consistent with no negligence on their part. In this case the employers gave no evidence of any inspection of the filters which might have revealed whether particles were entering with the stream of oxygen coming from the third party's works. The employers knew that particles might cause fire; there

was a filter for the purpose of preventing the access of impurities. Yet the employers did not suggest that any inspection of the filters was made to see if they were working properly. Thus, the suggestion that the fault which resulted in the fire arose from the third party's premises (over which the employers had no control), a suggestion which could have been acceptable as explaining how the occurrence could have come about without fault on the part of the employers, was not enough of itself. The employers had to show positively that diligence had been shown by them, so as to preclude any inference that they had been to blame, even if the origins of the occurrence had been under the exclusive control of a third party. The explanation proffered by the employers was silent as to exculpation, as was expressed by the Lord Justice-Clerk, Lord Grant, in language approved by Lord Upjohn. Lord Donovan expressed the onus on the employers, once *res ipsa loquitur* was established, in these terms:

"... it was for the appellants to show that the accident was just as consistent with their having exercised due diligence as with their having been negligent".

The way his Lordship continued to consider the evidence of the employers' failure to prove that the filter was reasonably effective in keeping foreign matter out of the oxygen pipe suggests that what Lord Donovan had in mind was the need for the defendants in a case of *res ipsa loquitur* to disprove negligence on their part: to show that they had not been guilty of any neglect which could have brought about the injury to the plaintiff.

In *Ludgate* v. *Lovett*[27] the defendant hired a motor van from the plaintiff and drove it on a motorway. Some three hours later, while he was driving at 60 miles an hour, the van suddenly swerved to the right. The defendant over-corrected it to the left and the van turned over several times, finally landing on the hard shoulder. It was completely wrecked and the defendant was seriously injured. In an action for damages for the defendant's failure to take proper care of the van, the plaintiff alleged that the damage thereto had been caused by the defendant's negligence and he relied on *res ipsa loquitur*. The defendant denied negligence and counterclaimed for damages for his injuries, alleging that in breach of an implied term of the hiring agreement that the van should be roadworthy, there was a defective tyre which deflated, causing the car to swerve. The trial judge found that there were no defects in the car when hired, accepted expert evidence that the tyre only deflated on impact with the verge, and dismissed the counter-claim. He however, accepted the defendant's assertion that he had not been negligent, and that he had neither gone to sleep nor failed to pay attention. The judge himself evolved a theory as to the cause of the accident and held that, although *res ipsa loquitur* applied, the claim must be dismissed since he was satisfied that the defendant had not been negligent. On appeal by the plaintiff, it was conceded that the judge's theory as to the way in which the accident happened was untenable. It was held, allowing the appeal, that on the facts *res ipsa loquitur* plainly applied and although the defendant could discharge the burden put upon him by satisfying the court that he had not been negligent, even if he could not show how the accident happened, his own evidence was in the circumstances insufficient to rebut the inference of negligence raised by the facts. The judge had accepted the defendant's denial of negligence only because he considered it to be consistent with certain assumed facts; but since those assumed facts had no basis, the whole foundation for the denial of negligence had gone; and accordingly, the judge's decision was against the weight of the evidence and the plaintiff was entitled to succeed.

Harman L.J. stated that once a case was one of *res ipsa loquitur*, the burden on the defendant was to explain what would otherwise be without explanation, or, if he could not explain it, at least to show that no fault of his was involved. He could do that even though he could not explain it. Thus, since in most instances where *res ipsa loquitur* arises, no explanation is readily forthcoming, the effect of the *maxim* is virtually to make the defendant show he was not negligent. In stating this to be the law, the learned Lord Justice relied upon *Walsh* v. *Holst & Co.*[25] and *Moore* v. *R. Fox & Sons*.[24]

In *Pearce* v. *Round Oak Steel Works, Ltd.*,[28] in November, 1965 the plaintiff was working a machine in the defendants' factory when a bolt broke, part of the machine fell and he was injured. He sued the defendants for negligence and breach of statutory duty. The plaintiff himself gave evidence and called a metallurgist who had examined the broken bolt and said that the breakage was due to metal fatigue which would not have been disclosed by routine inspection. The expert also said that the machine had been made in 1930 and bought secondhand by the defendants in 1959. He thought that in 1959 there would have been circumstances which could have put the defendants on enquiry so as to investigate the condition of the bolt. The defendants called no evidence. The judge held that the defendants had failed to rebut the inference of negligence. It was held on appeal that the burden on the defendants to rebut the inference of negligence raised by the *maxim, res ipsa loquitur*, could not be discharged merely by showing that there had been a latent defect not discoverable by the exercise of reasonable care in inspection and maintenance; there was a further duty on them to exercise reasonable care when they first acquired the machine and they had produced no evidence that they had done so; accordingly the appeal would be dismissed. Edmund Davies L.J. said (at page 682):

"The circumstances of this accident, in which a heavy weight fell on to the plaintiff who had in no way interfered with it, are such that there immediately arises a presumption of negligence against the defendants which they must rebut if they can."

In *Henderson* v. *Henry E. Jenkins & Sons*[29] a five-year old lorry was driven down a steep hill by its driver. At one point the brakes failed and the lorry collided with two other vehicles, killed a man and caused other damage. It was subsequently discovered that the pipe carrying the brake fluid was badly corroded and that the brake failure must have been caused by a large hole in the corroded part of the pipe. The instantaneous development of this hole

was very uncommon and would have allowed the driver no warning of the pending brake failure. The appellant sued the driver and his employers, the respondents. In evidence it was shown that neither the vehicle manufacturers nor the Ministry of Transport recommended the removal of the pipe for inspection, although only 60 per cent. of it was visible *in situ* and the remaining 40 per cent. (in which part of pipe the hole had occurred) was particularly prone, by reason of its position, to corrosion. Evidence also established that the degree and speed of corrosion was largely determined by the use to which the vehicle was put (*e.g.*, type of loads carried, places visited, unusual occurrences). The respondents led no evidence on this subject, however, relying on a plea of latent defect. It was held by the House of Lords (Lord Guest and Viscount Dilhorne dissenting) that the respondents had to prove that, in all the circumstances which they knew or ought to have known, they took all proper steps to avoid danger; they had failed to prove this and accordingly the appellant was entitled to damages.

I have dealt with a large number of authorities in order to illustrate the application of the *maxim, res ipsa loquitur*, and to bring home the point that in a case in which the operation of the principle contained in the *maxim* has been properly invoked the primary and fundamental effect is that there is a case for the defendant to answer. The secondary effect of this principle is that once the burden of proof shifts to the defendant, the mere happening of the accident affords reasonable evidence, in the absence of explanation by the defendant, that it was due to the defendant's negligence. Hence, if the defendant gives no evidence there must be a verdict for the plaintiff.

As regards the nature of onus which rests upon the defendant, counsel for the appellant referred to the view adopted in Australia in the case of *Mummery* v. *Irvings Proprietary Ltd.*,[30] which was applied in the more recent case of the *Nominal Defendant* v. *Haslbauer*,[31] that if the defendant produces a reasonable explanation, equally consistent with negligence and no negligence, the burden of proving the affirmative, that the defendant was negligent and that his negligence caused the accident, still remains with the plaintiff. On the other hand, it was held by the Court of Appeal in *Moore* v. *R. Fox & Sons, Ltd.*,[24] in which the *dicta* in various previous cases were discussed, that the onus of disproving negligence lies on the defendant, at least in the sense that it is not sufficient for him to show that there were several hypothetical causes consistent with an absence of negligence, but that he must go further and show either that the accident was due to a specific cause which does not connote his negligence, or that he had used all reasonable care in the matter. Something to the same effect was held by the House of Lords in *Colvilles, Ltd.* v. *Devine*[18] when Lord Guest said that the explanation only carries the defendant half way to success and that the explanation to be available as a defence must be consistent with no negligence on his part. That is the law in England today, even though Lord Upjohn said in the same case that the true ambit of the doctrine of *res ipsa loquitur* may one day require further elucidation, and I have not been able to find any case in which the Privy Council has said anything to the contrary. Even if I were to accept the view adopted in Australia, with which I regret to say I do not agree, the prerequisite for that view is a reasonable explanation by the defendant. What explanation has the defendant given in this case? Absolutely none.

It is contended for the appellant that the findings of the learned trial judge, to which I have referred earlier in my judgment, have no basis in fact. It is said that such facts as were proved showed that the deceased was wholly or partly responsible for the accident. Again, it is said that the judge's inference that the appellant swerved to the left was mere speculation which was not supported by evidence. It is further said that there was no evidence whatever to show where the accident took place or how it took place. And it is lastly said that the learned judge ought to have held that the unexplained happening of an accident where the facts are equally consistent with the negligence of either party, is no ground for inferring negligence on the part of the defendant. I can find no substance in any of these arguments, because what the learned trial judge said in effect was that this was a case of *res ipsa loquitur* and that it was for the defendant to explain how the accident happened, or at least to show that she was in no way guilty of negligence. I can find not an iota of evidence to suggest that the deceased was in any way negligent. If he was, it was for the defendant to prove it, which she chose not to do.

In my judgment, this is as clear a case of *res ipsa loquitur* as was the case of *Yow Fook* v. *Woon Kim Tew*[6] on which the learned trial judge relied for his conclusion that the defendant, having failed to give a reasonable explanation of what occurred, was liable in damages. As the learned trial judge pointed out, the facts in this case are quite similar to the facts in that case. In the circumstances, he had no alternative but to give judgment for the plaintiffs, and I cannot see how that judgment can possibly be challenged.

I would dismiss the appeal with costs.

Suffian Ag. L.P. and **Ali F.J.** concurred.

Appeal dismissed.

Solicitors: *Skrine & Co.; Khoo & Sidhu.*

SETAPAK TIN MINES SYNDICATE LTD. & ANOR. v. KHOO NEAN TEE & ORS.

[F.C. (Suffian Ag. L.P., Gill and Ali F.JJ.) June 5, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 107 of 1969]

Landlord and Tenant — Trespassers — National Land Code, 1965, s. 425.

In this case the appellants had in their counterclaim alleged that some of the respondents had occupied the defendant's mining lands illegally and they asked the court to order these respondents to deliver up vacant possession of the lands to them. The learned trial judge found that the